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June 30, 2016

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Re: MUR 7072
Response from Mr. Babulal Bera and Ms. Kanta Bera

Dear Mr. Jordan:

This letter is submitted on behalf of our clients, Mr. Babulal Bera and Mrs. Kanta Bera ("Respondents"), in response to a complaint ("Complaint") filed with the Federal Election Commission (the "FEC" or the "Commission") in the above-captioned Matter Under Review ("MUR"). As explained below, the Commission should dismiss the complaint in this matter because the Office of the General Counsel ("OGC") failed to give Respondents an unconditional 15-day period to respond to a legally-sufficient complaint, thereby violating their statutory and due process rights.

Alternatively, the Commission should exercise its prosecutorial discretion and dismiss the allegations as to Babulal Bera. Mr. Bera is an 83 year-old, first generation American. He has taken full responsibility for his conduct by entering a plea of guilty in the federal district court for the Eastern District of California. The court's sentencing, scheduled for August 4, will cover the full range of violations of the Federal Election Campaign Act, as amended (the "FECA" or the "Act"). Mr. Bera's acceptance of responsibility, remorse, age, and health issues, along with his lack of prior experience making political contributions, strongly support dismissal.

Beyond these considerations, a critical aspect of this matter is that all the contributions stemmed from Mr. Bera's attempt to aid his son's congressional campaign. If Mr. Bera had access to a sophisticated donor network or consulted experienced campaign finance counsel, he would have been told that he could provide unlimited support to his son through other means, such as by forming a Super PAC to advocate for his son's election or by making contributions to one. Unfortunately, Mr. Bera lacked such a network and did not seek such legal advice. His contributions, however, were made out of a desire to support his son's congressional campaign, rather than with the corrupt purpose of obtaining a quid pro quo benefit – which is the core conduct that the Act and Commission regulations are intended to address. There is no reason as a matter of enforcement policy or common sense for the Commission to impose further

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punishment on Mr. Bera for making an ill-informed choice about how to support the election of his own son.

With respect to Ms. Bera, the Commission should find no reason to believe she violated the Act because the complaint relies on inaccurate reporting contained in a single news article, not on any facts or evidence.

I. The Beras.

Mr. Bera is 83 years old. The oldest of eight children, he was born in India into a farming family where no one had any formal education. Determined to find a way out of poverty, Mr. Bera emigrated to the United States in 1958, and his wife, Kanta, now 82, joined him two years later. Mr. Bera obtained a Bachelor's and Master's degrees in chemical engineering at the University of Southern California. Mrs. Bera completed her Bachelor's degree at the University of Southern California and later received her Master's degree from the California State University, Los Angeles, and taught elementary school in California for over thirty years. After settling in California, Mr. and Mrs. Bera raised their three children, including their son, and now congressman, Amerish (Ami) Bera.

During the nearly sixty years that the Beras have been in the United States, they have supported and sponsored numerous family members who came to the United States to pursue the American dream.

As is common for individuals of the Beras' age, they suffer from a variety of serious medical conditions. Mr. Bera suffers from hypertension, back pain, and hearing loss. Mrs. Bera has severe osteoporosis and multiple fractures from falls.

Before Congressman Bera announced his decision to run for federal office, Mr. and Mrs. Bera never took any part in U.S. elections: they never made any contributions, never raised funds for campaigns, and never attended any campaign rallies or other events. As stated in Mr. Bera's plea agreement, he reimbursed contributions that others made to his son's campaign committee. Mr. Bera has taken full responsibility for his actions, and he is scheduled for sentencing on August 4, 2016.

II. Respondents have been deprived of an unconditional 15-day period to respond to a legally sufficient complaint.

The complaint served initially on Respondents failed to include the address of the complainant. Such information must be part of a complaint for it to be considered legally sufficient and, just as importantly, to inform a respondent of the identity of the person accusing

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them of violating the Act. After repeated delays, OGC finally provided this information to Respondents' counsel, but then refused to give Respondents an unconditional 15-days thereafter to respond, as is required by the Act. Instead, OGC improperly insisted that Respondents toll the statute of limitations in this matter for double the length of time that OGC was willing to give Respondents to file their response. By refusing to give Respondents an unconditional 15-day period to respond to a legally sufficient complaint, OGC has deprived Respondents of their rights under the Act and deprived the Respondents of due process.

On June 22, 2016, Mr. Jordan called Mr. Powers to advise that the complainant's address was on the envelope containing the complaint mailed to the Commission, but that OGC deemed it unnecessary to provide that information to Respondents. On the same day, OGC confirmed via email that "we have determined that your [sic] complaint is proper and your client has received notice as required under the Act."

OGC's proposal left Respondents with a Hobson's choice: either take the time to which they were legally entitled to file a response, but in return give the Commission an extra 40 days to file suit against them, or reject OGC's proposal and rush to submit a response so that the Commission would have it before taking any action on the complaint. The Beras chose the latter.

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On June 24, 2016, with OGC still withholding the complainant's address, we sent a letter to OGC, rejecting their demand and agreeing instead to file a response by June 30. It was not until three days after we emailed our June 24 letter that OGC finally notified us of complainant's address by sending us a copy of the envelope.

OGC may not consider complainant's address material to the complaint, but the Commission has deemed it of utmost importance, requiring dismissal where such information is lacking.¹ Indeed, if a complaint fails to include a complainant's name and address, the Commission has no jurisdiction to act on it.² Notably, other government agencies are required to provide comparable information when seeking legal recourse against persons under their jurisdiction. For example, California's Penal Code, in a provision encapsulating the Supreme Court's *Brady v. Maryland*³ due process protections, requires the disclosure of the name *and* address of any witnesses the prosecutor intends to call.⁴ The complainant's identity in the FEC's enforcement process is at least as important as the identity of a witness in a criminal proceeding.⁵ The requirement to provide the complainant's address fulfills the Commission's obligation to provide notice and a meaningful opportunity to confront the allegations asserted against respondents. Without knowing the identity of the person alleging violations of the Act, a respondent is denied the full benefit of the rights to which he is entitled.

By refusing to give the Beras their unconditional 15-day period to respond to the Complaint after the complainant's address was finally provided to their attorneys, OGC has deprived Respondents of their rights under the Act. Furthermore, such action violates basic principles of fairness and due process. For these reasons, the Commission should dismiss the Complaint as to the Respondents.

¹ See 11 C.F.R. §§ 111.4(b) and 111.5. The requirement that a complaint include the complainant's address is reiterated in the Commission's guide to respondents and in its Enforcement Manual. See Federal Election Commission, *Filing a Complaint*, (June 2008), available at <http://www.fec.gov/pages/brochures/complain.shtml>; see also Memorandum from Anthony Herman, General Counsel, to the Federal Election Commission, re: OGC Enforcement Manual (June 26, 2013), available at http://www.fec.gov/agenda/2013/mtdgdoc_13-21-b.pdf.

² See 45 Fed. Reg. 15,080 (Mar. 7, 1980) ("Subsection (b) [of 111.4] sets forth the statutory requirements with which a complaint must comply in order for the Commission to act upon it. A complaint is improper if it does not comply with this subsection, and shall not be acted upon by the Commission.")

³ 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

⁴ CAL. PEN. CODE § 1054.1.

⁵ It may be more so: the complainant is the only source of information at the reason-to-believe stage, whereas the government may be producing the names and addresses of many witnesses in a criminal trial.

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III. The Commission should dismiss the allegations against Mr. Babulal Bera as a matter of prosecutorial discretion

A. Mr. Bera has taken full responsibility for his actions through his criminal plea

The Complaint fails to assert a single allegation against Mr. Bera personally. Instead, it attaches documents related to Mr. Bera's recent criminal plea agreement as purported evidence of violations by others. Nonetheless, OGC named Mr. Bera as a Respondent in this matter. Should the Commission decline to dismiss on the grounds asserted above, it should exercise its prosecutorial discretion as it has in past MURs where individuals, like Mr. Bera here, have taken full responsibility for FECA violations in a parallel criminal proceeding.

As the documents attached to the Complaint demonstrate, Mr. Bera has admitted to and taken responsibility for his actions through his plea agreement with the U.S. Attorney's Office for the Eastern District of California on May 10, 2016. Mr. Bera has pleaded guilty to both 52 U.S.C. §§ 30116(a)(1)(A) and 30122, excessive and reimbursed contributions, the only provisions of the FECA related to him in this MUR. He is awaiting sentencing on August 4.

As the Commission has done in past MURs, it should exercise its prosecutorial discretion and dismiss the Complaint because the conduct covered in the plea agreement is identical to that at issue in the Complaint, thus obviating the need for the Commission to vindicate the purposes of the FECA. See MUR 6233 (Norman Hsu) (dismissing matter where respondent was convicted, after trial for reimbursing over \$100,000 in federal contributions); MUR 6231 (Glenn A. Marshall) (dismissing allegations of reimbursed contributions where respondent pleaded guilty to making criminal corporate contributions); MUR 6232 (Gladwin Gill) (dismissing matter where respondent pleaded guilty to reimbursing approximately \$67,000 in federal contributions).

Here, not only has Mr. Bera taken full responsibility for his actions, he faces significant repercussions for his actions -- up to 30 months in jail, substantial fines, and the collateral consequences of being a convicted felon. Nothing more would be gained by pursuing Mr. Bera through the Commission's administrative enforcement process.⁶

Although the Commission has pursued civil enforcement of the FECA in some instances where an individual has also pleaded guilty to criminal charges, it has only done so where the

⁶ The Commission should take note that the Bera for Congress committee disgorged an amount of \$268,726 on May 10, 2016 to the U.S. Treasury. See Bera for Congress, 2016 Pre-Primary Report at 432 available at <http://discquery.fec.gov/cgi-bin/fecimg/?201605269017314154>.

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FECA liability was not completely resolved in the plea agreement. Among the more recent examples is MUR 6528 (Michael Grimm for Congress), where the Commission found reason to believe that former Congressman Michael Grimm had violated the Commission's regulations related to soliciting foreign national contributions. The Commission made its reason-to-believe finding as to Grimm, even though he was incarcerated at the time, in light of Grimm's guilty plea to tax fraud, not FECA violations.⁷ Similarly, the Commission pursued Mitchell Wade in MUR 5666 (MZM, Inc.) even though Wade had pleaded guilty to, among other charges, a violation of 52 U.S.C. § 30122. The Commission's civil remedy, however, was for additional violations, including violations of the corporate and federal contractor contribution bans.⁸ In yet another example, the Commission pursued a former employee of a labor union's political committee in MUR 6526 (Cora Carper) for violations of the FECA's commingling provisions⁹, when that employee had pleaded guilty to federal embezzlement charges¹⁰

These cases are illustrative -- where the Commission has overlapping jurisdiction, it pursues civil remedies for FECA, but only if the same violations have not been addressed in the criminal context. Unlike in the above-mentioned matters where respondents pleaded guilty to some (or no) FECA violations, Mr. Bera has pleaded guilty to all FECA violations arising from the criminal proceeding. In doing so, he had every reason to expect that this would resolve his liability under the Act. The Commission and the Justice Department are, after all, two offices of the same government.¹¹

As demonstrated by the discussion above, if the Commission were to decline to exercise prosecutorial discretion in this MUR, it would be changing course from its earlier cases without fair and adequate notice to Mr. Bera. As the Supreme Court recently reiterated: "In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."¹² In dismissing MURs 6223, 6231, and 6232, the Commission explicitly stated that it opened a MUR in those matters for the purpose of "providing guidance."¹³ Based on that guidance, the Commission should dismiss the allegations against Mr. Bera.

⁷ See Certification, MUR 6529 (Michael Grimm) (Oct. 5, 2015).

⁸ 52 U.S.C. §§ 30118, 30119; see Conciliation Agreement, MUR 5666 (MZM, Inc.) (Oct. 24, 2007).

⁹ 52 U.S.C. § 30102(b)(3).

¹⁰ 29 U.S.C. § 501(c); see Addendum to Plea Agreement, MUR 6526 (Cora Carper) (July 2, 2013).

¹¹ The criminal matter is captioned "U.S." v. Bera."

¹² *Encino Motor Cars, LLC v. Navarro*, Slip. Op. at 9, 579 U.S. ____ (2016).

¹³ See MUR 6233 (Norman Hsu), Factual and Legal Analysis at 1; MUR 6231 (MZM, Inc.), Factual and Legal Analysis at 1; MUR 6232 (Gladwin Gill), Factual and Legal Analysis at 1.

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B. Mitigating circumstances warrant dismissal.

It is difficult to imagine more compelling circumstances for the Commission's prosecutorial forbearance. Mr. Bera is 83 years old and suffers from numerous medical ailments. He is also a first-generation immigrant from India for whom English is a second language. While Mr. Bera has acknowledged responsibility for violations of the Act, his plea agreement subjects him to a sentence of up to 30 months of incarceration, substantial fines, and all the collateral consequences of a felony conviction. And, after enduring a criminal prosecution at 83 years old, there is no risk that Mr. Bera will violate the Act in the future.

In addition, until his son ran for a seat in the U.S. House of Representatives, Mr. Bera had not made a single contribution to a federal candidate, raised money for a federal candidate, or attended a campaign meeting or other event. Simply put, he was a political novice, spurred to participate in politics only out of a desire to support his son.

For these reasons, the Commission should exercise its prosecutorial discretion and dismiss the allegations against Mr. Bera pursuant to *Heckler v. Chaney*.¹⁴

C. Contributions made to support the election of Mr. Bera's own son warrant no further punishment.

If Mr. Bera had consulted with a sophisticated donor network or experienced campaign finance counsel, he would have discovered alternative, lawful vehicles for providing unlimited support for his son's campaign. He could have established a Super PAC or contributed to one dedicated to supporting his son's election. Or perhaps he could have given his son a loan or a gift. Two Commissioners have characterized the Commission's general approach to treating familial gifts as contributions as "arbitrary and capricious," providing "inadequate notice to the regulated community about what is permitted and what is not."¹⁵ The Supreme Court in *Citizens United v. FEC* subsequently held that the only justifiable campaign finance regulations are those that prevent *quid pro quo* corruption or its appearance, suggesting that any attempt by the Commission to limit financial gifts from a father to his candidate son may be unconstitutional.¹⁶

¹⁴ 470 U.S. 821 (1985). Indeed, many of these same factors, were a basis for the Commission's dismissal in MUR 6491 (Mark Hicks) (citing respondent's age, health, unfamiliarity with election laws, and unlikelihood of violating the Act in the future).

¹⁵ MUR 5724 (Jim Feldkamp for Congress), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter.

¹⁶ 558 U.S. 310 (2010).

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Given the availability of lawful alternatives to Mr. Bera for providing unlimited support to his son's campaign and the common sense proposition that campaign contributions from a father to his son are not made for the purpose of obtaining a *quid pro quo* benefit, there is no point in (further) punishing Mr. Bera for choosing a poor vehicle to support the election of his own son.¹⁷

IV. The Complaint's allegations against Mrs. Kanta Bera are based on inaccurate reporting, not facts or evidence.

The allegations against Mrs. Bera are based on an inaccurate statement in a single news article that is unsupported by facts or evidence. In light of the stress created by unnecessarily subjecting an 82-year old woman to these legal proceedings, we urge the Commission to find no reason to believe that Mrs. Bera violated the Act and dismiss the Complaint against her forthwith.

The Complaint refers to Mrs. Bera in just a single statement: "Reportedly, Ami Bera's mother [Kanta Bera] also was involved in the money-laundering scheme but was not prosecuted in the Prosecutor's discretion as a result of Babulal Bera's guilty plea." Complaint at 2. To support this allegation, the Complaint relies on a SACRAMENTO BEE article that states:

Court papers describe how Babulal Bera and his wife first made the maximum allowable individual contributions to Ami Bera's campaign committee and then recruited others to make maximum contributions. Then he reimbursed them out of his own pocket. [Acting U.S. Attorney] Talbert said that as part of the plea bargain the government agreed not to charge Babulal Bera's wife.¹⁸

The court papers cited by the SACRAMENTO BEE, however, are devoid of any facts that suggest Mrs. Bera violated the Act. Far from being inculpatory, the only reference to Mrs. Bera in the Information relates to a lawful act -- her maximum contributions to her son's 2010 and 2012 campaigns.¹⁹ The Complaint, therefore, simply regurgitates a factual misstatement. It

¹⁷ In a recent MUR involving contributions from parents to their son's congressional campaign, the Commission took no action with respect to the parents. See MUR 6440 (*Friends of Frank Guinta*).

¹⁸ Walsh, Denny, *Rep. Ami Bera's father pleads guilty to election fraud*, SACRAMENTO BEE (May 10, 2016).

¹⁹ *U.S. v. Bera*, Information ¶¶ 6, 10, Case No. 2:16-CR-00977TLN (E.D. Calif. May 9, 2010). It is unclear why the U.S. Attorney's Office referenced Mrs. Bera's contributions, but one possible reason would be to show that Mr. Bera could not reattribute any potentially excessive contributions under 11 C.F.R. § 110.1(k). Standing alone, this agreement simply cannot provide a reasonable basis to believe Mrs. Bera violated the Act.

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would be plainly improper for the Commission to make a reason to believe finding against Mrs. Bera based on guilt by association.²⁰

Moreover, the fact that the U.S. Attorney's Office agreed not to charge Mrs. Bera as part of Mr. Bera's plea agreement is not relevant to Mrs. Bera's potential liability. That was an agreement between Mr. Bera and the government, not Mrs. Bera. As clearly stated in the agreement, "the government previously informed [Mr. Bera] that it *did not intend* to prosecute the defendant's wife, Kanta Bera" (emphasis added).²¹ Thus, if the plea agreement evidences anything regarding Mrs. Bera, it is that the U.S. Attorney's Office never intended to prosecute her. There is no basis to interpret this information as anything more than that.

Accordingly, the Commission should find no reason to believe that Mrs. Kanta Bera violated the Act, and it should dismiss the allegations against her immediately.

V. Conclusion

The Commission should dismiss the Complaint as to Mr. and Mrs. Bera. As explained above, OGC failed to afford them their unconditional right to respond within 15 days of receiving a legally sufficient complaint. Alternatively, the Commission should exercise its prosecutorial discretion by dismissing the Complaint against Mr. Bera, just as it has in cases involving similarly-situated respondents. Finally, because the allegations against Mrs. Bera lack any factual support, the Commission should find no reason to believe that she violated the Act.

Respectfully submitted,



Lawrence H. Norton
William A. Powers

²⁰ See MUR 4960 (Hillary Rodham Clinton), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.")

²¹ *U.S. v. Bera*, Plea Agreement, Part III.C. Case No. 2:16-CR-0097TLN (E.D. Calif. May 10, 2010).